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No. 237

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IN THE

Supreme Court of the United States

October Term, 1960

ATLANTA NEWSPAPERS, INC., GEORGIA PRESS ASSOCIATION, and MARION JOHNSON,

Appellants,

—v.—

T. RALPH GRIMES, as Sheriff of Fulton County, Georgia, and THE STATE OF GEORGIA, by Paul Webb, Solicitor General of the Atlanta Judicial Circuit,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND DENYING CERTIORARI

B. P. GAMBRELL
1110 Hurt Building
Atlanta 3, Georgia

W. GLEN HARLAN
825 Citizens & Southern
National Bank Building
Atlanta 3, Georgia

ROBERT G. STEPHENS, JR.
314 Southern Mutual Building
Athens, Georgia

Counsel for Appellants

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This Court is respectfully urged to reconsider its order of October 10, 1960 dismissing the appeal on the authority of *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549 (1947), and denying certiorari in this case, the Court's complete order being as follows:

> "The appeal is dismissed. *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied."

Appellants submit that the principle of the *Rescue Army* case does not support denial of review in this case. On the

contrary, the basic reasoning of the Court in the *Rescue Army* case demonstrates that review is required and should be granted.

The Court's reference to the *Rescue Army* decision suggests that the Court thought this case represented either:

(1) A mere hypothetical attack on the validity of the trial court's rule banning photographs and recorded interviews in the Fulton County Courthouse Square—that is, an attack on "the validity of the provisions on their face, not as applied to proven circumstances" (331 U. S. 555); or

(2) A situation in which the correct interpretation of the rule was inherently doubtful and had been left in doubt by the decisions of the lower courts (331 U. S. 580-584).

As we shall demonstrate herein, a very real "case or controversy" is presented in this appeal, predicated upon a clearly defined factual situation in which the constitutional issues have been squarely presented and decided by the lower courts. Moreover, there is no possible ambiguity or uncertainty as to the meaning or application of the trial court's rule, as the rule has been fully defined and explained by the trial court and affirmed by the Supreme Court of Georgia as so defined. In short, this case "tenders the underlying constitutional issues in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts" (331 U. S. 584)—contrary to the situation in the *Rescue Army* case.

The Court's reference to the *Rescue Army* case may also indicate a belief that the only "burden" resulting to appellants from denial of review would be, as in the *Rescue Army* case, the "inconvenience" of further trial. As we shall demonstrate herein, the burden here is far more significant, as

the inevitable result of this Court's denial of review would be a severe curtailment of freedom of the press and a substantial blackout of news-gathering in the Fulton County Courthouse Square for the many months which would be necessary before a new "case or controversy" testing the validity of the trial court's rule could be brought to this Court. That "burden" would be borne by the newspaper-reading public as well as the appellants and other news media and would constitute a continuing infringement of First Amendment rights which should not be tolerated where, as here, the constitutional issues are clearly defined in a concrete factual situation of genuine controversy.

The Trial Court's Rule

On November 3, 1958, Judge Durwood T. Pye, one of the judges of the Superior Court of Fulton County, Georgia, promulgated a rule, paragraph 3rd (hereinafter referred to as the "rule") of which provided as follows (R. 257):

> "No photograph of any party to any trial or of any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial, shall be taken at any place in the courthouse building, on the courthouse steps, or on the adjacent sidewalks and public streets. Nothing done or said by any such person at any such place shall be recorded by any television instrument, moving-picture camera or other instrument, sound-scriber, tape recorder, wire recorder, or any other recording device or equipment. This Rule 3rd shall apply at all times during trials, and in respect of a particular trial, until it shall have been completed and all persons in attendance thereon shall have retired from the courthouse and adjacent sidewalks and public streets, and thereafter shall have dispersed."

At the beginning of Judge Pye's order announcing the rule is the following language (R. 257): "In the Superior Court of Fulton County, Georgia. Notice will be taken of the following provisions in respect of all proceedings in this Division, and the Sheriff will enforce them, to-wit:" Then follows the rule. Therefore, the duty of enforcement rested on the Sheriff from the date of the rule, and there was a legal presumption that he was enforcing and would enforce it, plus the testimony, as we hereinafter point out; that the appellants would have continued to take pictures on the streets and sidewalks adjacent to the courthouse as they had done prior to the rule, except for the rule barring them from doing so. There was evidence, as hereinafter set out, that the Sheriff, when these parties stated their intention of taking pictures, announced that if they did so he would, pursuant to the provisions of the order, arrest them and take them before the trial judge.

ARGUMENT

I.

A genuine "case or controversy" is presented in which the constitutional issues are clearly defined.

Since the Court's reference to the *Rescue Army* case suggests the lack of a clearly defined "case or controversy" on the constitutional issues, it seems appropriate to detail the steps taken by appellants before presenting their action for declaratory judgment.

The record shows that Judge Pye's order was issued at a time when it would prevent news-gathering in the Fulton County Courthouse Square during two exceptionally newsworthy trials. As both the Georgia Supreme Court (Jurisdictional Statement, Appendix 9a-10a) and the trial court

(Jurisdictional Statement, Appendix 108a-109a) pointed out, the rule was issued immediately before (1) the trial of certain individuals charged with bombing a house of worship known as "The Temple"—a trial of substantial and widespread interest; and (2) the trial of T. V. Williams, the Revenue Commissioner of Georgia, and other public officials charged with misappropriation of public funds and other offenses—also a matter of great public interest (R. 71).

The trial court found (Jurisdictional Statement, Appendix 108a-109a):

> "21. Had said picture-taking and sound recording not been curtailed by the Rule entered by the Court November 3, 1958, jurors, parties, witnesses, spectators and other participants would not have had free access to the sitting of the Court during the trial of George Bright, and the trial of T. V. Williams, held at the November Term, 1958.
>
> * * * * *
>
> "27. Plaintiff Atlanta Newspapers, Inc. would have engaged in general sound recording of the sayings and general photography of the persons of parties, defendants, attorneys, witnesses, spectators and other participants in the cases of the State vs. George Bright and State vs. T. V. Williams, tried in said Division during the November 1958 Term, while they were in the Courthouse Square on their way to and from the Court and while in attendance on the Court during the trials, and published the same, except for the prohibitions of Part 3rd. of said Rule."

Being keenly aware of the imminence of these two outstanding trials, and of the devastating effect Judge Pye's rule would have on the ability of appellants to cover such trials for the information of the public, the Vice President

and Executive Editor and the Chief Photographer of appellant Atlanta Newspapers, Inc. went to the Fulton County Sheriff to determine whether and exactly how Judge Pye's rule would be enforced. It was the Sheriff's duty, under the terms of Judge Pye's order, to enforce the rule (R. 257). As the Vice President and Executive Editor testified (R. 19-24):

> "Prior to that date I or the paper had been taking photographs of persons going to and coming from the court room in Fulton County, Georgia. By that I mean that my photographers had instructions to take pictures on the streets adjacent to the courthouse. . . .
>
> "It was my purpose or it was the purpose of Atlanta newspapers, including the Atlanta Journal, one of the *papers published by Atlanta Newspapers, Inc., and the* Atlanta Constitution, to continue to take pictures of persons, that is to say, spectators and parties engaged in the trial of cases, or attending the trial of cases in Fulton County, Georgia, prior to the signing of the order of Judge Pye just referred to. We had intended to until the order. Except for the order, I would have taken pictures shortly after that on the streets of parties and spectators attending trials while they were on the streets and adjacent to the courthouse and going either to the courthouse or coming from the courthouse. There was nothing that stopped me from doing that except Judge Pye's order and the information from the Sheriff that he would arrest me if I did so.
>
> "After that order was signed, I came down to the courthouse for the purpose of letting my wishes to take pictures be known to the Sheriff and asking him about it. I told Sheriff Grimes that I desired to take pictures if I could do so without violating the Court order and that except for the Court order I would take pictures. . . . I went down, came down here to the courthouse,

along with Marion Johnson, who is the chief photographer for our papers, and as such is under me. I am his direct supervisor. We walked down from the Atlanta papers and Mr. Johnson brought along a Leica camera. We stopped at the parking lot on the northwest corner of Hunter and Pryor Streets and left the camera there to avoid any possibility of a misunderstanding, just checked it with an attendant, and Mr. Johnson and I walked all of the way around the courthouse to look at the lay of the land and to refresh our minds on the general layout, with the idea that if we send our photographers over to cover a story we should know precisely what the ground looked like. We then walked into the main lobby of the courthouse to see Sheriff Grimes. On our way to his office we met him in the corridor. I stopped him and introduced myself and told him that Mr. Johnson and I would like to talk to him. He invited us into his office and we all three sat down. I told Sheriff Grimes that we had read the order of Judge Pye forbidding taking of pictures on the sidewalks and public streets adjacent to the courthouse and that we were very ready to assure him that we did not want to be in contempt of Judge Pye's court because we respected it; we wanted to do nothing that would indicate that we were contemptuous. However, we told the Sheriff that we had, of course, a trial of major newsworthiness coming up on the following Monday, that we had planned to take pictures on the sidewalks and public streets, and before that trial came up we wanted to find out from him precisely what the order meant and precisely what was to be considered sidewalks and public streets. We told him we wanted to take pictures on the sidewalks if we could take them, and then I asked him to tell us where we could stand and make a picture. He replied to the effect that the order meant what it

said, and I said, 'Well, we need to know specifically because we don't want to get a photographer in trouble or in contempt of Court. Could you tell me if—' and this is only a rough quotation of what I said— 'could we stand on the sidewalk in front of the courthouse by the steps and take a picture,' and he said, 'No, that is adjacent to the courthouse.' I asked him if we could stand on the street and take a picture. He replied to the effect that that also was adjacent to the courthouse. Under the terms of the order I asked him if we could stand on the sidewalk across the street, away from the courthouse, anywhere around the square, and take a picture. He said no, that he would consider that adjacent to the courthouse. We indicated to him that we wanted to take pictures in those locations if we could without being in violation of the order. The conversation was pointed toward the following Monday when a trial was to occur that we wanted to cover, and we attempted to get some idea of where we could operate under this order with a photographer. I asked the Sheriff if we could put a photographer on the northwest corner of Pryor and Hunter Streets, on that parking lot corner, away from the courthouse and he said he would consider that adjacent, and we had asked him what he would do if we came on down there and made a picture, and he told us that he would enforce the order of the Court.

• • • • •

"Except for that order and for this statement of the Sheriff that he would enforce the order, we would have taken pictures on the following Monday as routine news coverage.

"You ask me what we were going to do with our camera that afternoon if he had said we could go ahead and take them on the sidewalk. Well, we intended to

come back over with the camera that afternoon if he had been able to give us any further information and if he could have given us a particular street corner that he would judge not to be adjacent to the courthouse where we could take pictures, then we intended to use the camera to get our lenses, our ranges, and our general layout and angles figured out so we could cover the story on Monday. That trial on Monday was a newsworthy trial so far as we understood it, attracted general attention over Georgia and elsewhere. That was the Williams' trial.

"On account of this order and on account of the Sheriff's statement that he would enforce it, we refrained from taking pictures on that Monday, and we have refrained from taking pictures since that time. We have not taken pictures since that time.

* * * * * *

"The Sheriff made no threat of any physical violence to me or the photographer or to our equipment if we attempted to take pictures. It was our understanding of what he meant that he would take the photographer into custody and take him before the Judge. The action which he outlined we understood was to take us before the Judge."

The Chief Photographer testified (R. 30-34; 37):

"We planned to take some pictures on the streets and sidewalks during the trial of T. V. Williams, which was to occur and did occur the week following the order, and except for the order we would have taken pictures on the streets of parties and spectators during that trial.

"I came down to see Sheriff Grimes about that order. I believe it was Friday morning before the trial was to

begin on Monday that I went down to see him. I don't recall the date. I think it was Friday morning before the Williams' trial was to begin. I believe that would have been Friday after the Monday that the order was signed. Mr. Eugene Patterson went down there with me. I work under Mr. Patterson.

* * * * *

"The Sheriff invited us into his office and we all sat down; we did not want to disobey the order, but we wanted to find out exactly what we could do, where we could make pictures from, and we did not want to send a man over and did not want to come over myself and disobey the order, but we wanted to comply with it completely, and we asked him exactly where we could operate from and be within the order. I asked him if a photographer stood in the middle of the street and made pictures, if he would be disobeying the order. I said would a photographer standing in the middle of the street and making a picture, would he be disobeying the order and the Sheriff said he would and that he would have to arrest him. The northwest corner, which was the spot that I had left the camera, also up Hunter Street west of Pryor, all of those areas the Sheriff said he would consider to be close enough that it would be in violation of the order, and anywhere on either side of the street, either sidewalk completely surrounding the courthouse, that he would consider adjacent to it and would come under the order.

* * * * *

"Except for this order of Judge Pye's that we are talking about the paper would have had me and others take pictures for the paper at the Williams' trial. We would have taken pictures on the sidewalks and

streets adjacent to the courthouse during that trial of spectators and possibly of the parties except for the order. It was my plan and it would be my plan and it has been my plan to take pictures on the streets and sidewalks of trials of public interest or people who attended trials of public interest except for this order, and except for the order and the Sheriff's statement that he would arrest me, I would have taken pictures before this date, subsequent to the order, and before this date. It is my desire and the desire of the papers now to take pictures of people attending important trials on the sidewalks and streets adjacent to the courthouse.

• • • • •

"The Sheriff did not mention anything to me about physically preventing me from taking pictures, or confiscating my equipment in any way. The sole penalty or action which he stated that he would take was limited to arresting us. I believe he did say that he would take us before the Judge, I wouldn't be positive but I am almost sure he did.

• • • • •

"In addition to talking to the Sheriff about taking pictures generally, we asked him specifically about taking pictures of participants and spectators in the Williams' trial which was to occur the following Monday, and he stated what I have just stated in response to it, that he would arrest us."

From the foregoing facts it is apparent that the controversy involved in this litigation is not imaginary or hypothetical. Judge Pye's rule was real. It was issued to prohibit a course of conduct by appellants. More specifically, it was issued to prevent essential news-gathering

functions in connection with two highly important and newsworthy trials—both of which appellants intended to cover in the very manner that the rule prohibited.

The constitutional issues could not be presented with greater precision. Appellants were specifically threatened with arrest if they took pictures of persons going to or from Judge Pye's courtroom, anywhere on the streets and sidewalks adjacent to the courthouse. The Sheriff's language was broad enough and emphatic enough to deter the appellants thereafter from taking pictures of such persons on the streets and sidewalks adjacent to the courthouse. Not only was the certainty of arrest, in event of a violation of the rule, made clear, but the exact boundaries beyond which appellants or others could not go in taking such pictures without being arrested were defined by Judge Pye's rule and construed accordingly by the enforcement officer, the Sheriff. Judge Pye's later order (Jurisdictional Statement, Appendix 12a-119a) holding the rule valid and ordering its continued enforcement (Appendix 119a) demonstrates the certainty that the rule will be enforced in the absence of a reversal of this case. The taking of pictures and an appeal from a judgment for contempt for doing so, if such had occurred, would not have placed the issues in any sharper focus than the manner in which they are presented in the declaratory judgment proceeding under the circumstances in this case.

We are unable to find any case where it has been suggested that a court order, before it has been set aside or declared void, should be violated in order to have its constitutionality determined, and we do not believe that this Court means to say that an individual may challenge a rule depriving him of his rights under the First Amendment only after suffering a fine or imprisonment for violating it. The *Rescue Army* case does not so indicate. On the

contrary, that decision specifically recognizes (331 U. S. 565-568) that a writ of prohibition or comparable procedure to prevent prosecution is available to test such constitutional rights where the issues are clearly defined. See discussion of *United States* v. *United Mine Workers*, 330 U. S. 258 (1947), *infra*, page 22.

The well-established ruling of this Court is that declaratory judgment procedure may be used to test constitutional issues on the same terms as other procedure. Thus, in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89 (1947) the Court said:

> "For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions', are requisite. This is as true of declaratory judgments as any other field . . . Appellants want to engage in 'political management and political campaigns', to persuade others to follow appellants' views by discussion, speeches, articles and other acts reasonably designed to secure the selection of appellants' political choices. Such generality of objection is really an attack on the political expediency of the Hatch Act, not the presentation of legal issues."

The Court further said (330 U. S. 89-90):

> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough . . . It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other."

Similarly, in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945) the Court had the following to say with respect to declaratory judgment procedure in the circumstances there involved (325 U. S. 460-461):

> "We are thus invited to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated. Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves; and with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure.
>
> "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit."

In the instant case, there is no mere "generality of objection" or "hypothetical threat" such as existed in the *Mitchell* case. This is a case where "the interests of litigants require the use of this judicial authority for their protection against actual interference" and where "definite rights appear upon the one side and definite prejudicial interferences on the other." Moreover, it is quite clear that in this case, contrary to the situation in the *McAdory* case, Judge Pye's rule has been "threatened to be applied . . . in the manner anticipated", and there has been an "authoritative construction of the statute by the state courts." There is here a "concrete set of facts to which the statute is to be applied."

It follows that there is no reason why the declaratory judgment procedure should not be respected by this Court,

as it has been respected by the State courts below and by this Court in other similar circumstances.

It may be noted that declaratory judgment has been used to prevent interference with the rights of freedom of speech and the press. See *Speiser* v. *Randall*, 357 U. S. 513, 515 (1958), and particularly Case No. 483 there decided. In numerous other situations this Court has approved the prohibition, *in advance*, of the enforcement of statutes, ordinances and rules which would restrict freedom of speech and the press. See *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Hague* v. *Committee for Ind. Organization*, 307 U. S. 496 (1939); *Hill* v. *Florida*, 325 U. S. 538 (1945) and *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946). In the *Hague* case, this Court apparently recognized that a definite plan and threat of enforcement agencies to carry out enforcement of an ordinance was sufficient to raise the constitutional questions dealing with freedom of speech and the press. Even more specifically, in the *Watson* case, the Court pointed out (327 U. S. 594-595):

> "Moreover, the threat to enforce the Florida law is real and imminent. *Quo warranto* proceedings have been instituted against several of the corporations who are parties to the suit on the basis that they have closed-shop agreements with the unions. And appellee Watson has announced a policy to prosecute criminally all violations of the Florida law. The threat of multiplicity of prosecutions which is here alleged would not alone be sufficient to establish a cause of action in equity . . . But we mention the matter here to show that the threat of irreparable injury is real not fanciful, immediate not remote."

In *Hill* v. *Florida*, this Court deemed that an adequate "case or controversy" was presented where it found (325 U. S. 543) that:

"if the union or its representatives acted as bargaining agents without making the required reports, presumably they would be liable both to punishment for contempt of court and to conviction under the misdemeanor section of the act."

See also *Railway Mail Assoc.* v. *Corsi*, 326 U. S. 88, 93 (1945) where the Court found an adequate "case or controversy" in a situation where "legal rights asserted by the appellant are threatened with imminent invasion by appellees."

In the instant case there is substantially the same serious, immediate and imminent threat of invasion of appellants' rights as appeared in the cases referred to above.

Here, contrary to the situation in the *Rescue Army* case (see 331 U. S. at 555), the validity of Judge Pye's rule may be tested as "applied to proven circumstances"—such circumstances being the definite plan of appellants to take pictures in the Fulton County Courthouse Square during specific newsworthy trials occurring immediately following issuance of the rule, and the definite threat of arrest by the Sheriff if that plan were carried out.

II.

The rule and its interpretation by the lower courts are not ambiguous or uncertain.

As demonstrated above the instant case, contrary to the situation in the *Rescue Army* case, presents a genuine "case or controversy" concerning First Amendment rights.

Also contrary to the situation in the *Rescue Army* case, the instant case involves no uncertainty as to the inherent meaning or application of Judge Pye's rule or as to its interpretation by the lower courts.

In the *Rescue Army* case, the Court pointed out that there was a complex interlacing of various provisions of the statute there in question which created substantial doubt as to the statute's meaning and application. The Court noted (331 U. S. 578) that:

> "Apart from invading the state courts' function, the problem of extricating the applicable provisions from such a mass, together with matters of severability likely to arise, would be formidable. And when discharged the result might be merely that we had performed it and determined the constitutional issues so presented, only to find that in the further proceedings to be had in the Municipal Court our interpretation had been put aside in favor of another."

It could not be suggested that Judge Pye's rule is of such an uncertain character. It clearly and explicitly forbids any photograph or recorded interview with respect to "any party to any trial or of any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial . . . in the courthouse building, on the courthouse steps, or on the adjacent sidewalks and public

streets." The effective period of the rule is equally clear—"at all times during trials, and in respect of a particular trial, until it shall have been completed and all persons in attendance thereon shall have retired from the courthouse and adjacent sidewalks and public streets, and thereafter shall have dispersed."

If there could be any question as to the meaning of Judge Pye's rule, the Sheriff's explanation (see testimony quoted above) and Judge Pye's own exhaustive interpretation, with illustrations as to times, persons, locations and activities covered and those not covered (Jurisdictional Statement, Appendix 18a-31a; 85a-97a), and his order adjudging it valid and continuing it in effect (Appendix 119a), constitute a complete exposition. The Georgia Supreme Court's affirmance of Judge Pye's decision contains no suggestion that a different interpretation was considered or available. Thus, the rule was effective and is effective, until reversed, in preventing appellants from obtaining pictures which they have a constitutional right to obtain. This situation is completely different from that in the *Rescue Army* case, where this Court found substantial ambiguity in the decision of the State court (331 U. S. 580-584).

There can be no doubt that the constitutional issues were squarely raised and passed upon by the lower courts. The original petition filed by appellants was predicated upon such constitutional issues (R. 265-266), relying specifically on "the right of freedom of the press and fairly using the press" and "Section 1 of the First Amendment to the Constitution of the United States."

Judge Pye's decision specifically noted (Jurisdictional Statement, Appendix 16a):

> "If, in fact, the Rule which is here under attack be subject to the objections stated in Plaintiffs' petition—if the Rule in fact be in violation of the Constitutions of

the State of Georgia and of the United States—it would be the duty of the Judge to revoke the Rule."

He concluded (Appendix 113a):

"7. Said Rule Part 3rd. does not deprive the plaintiffs of any right which they possess under the Constitution of Georgia or of the Constitution of the United States, or of any right or privilege which they have in virtue of statute or in virtue of the common law."

He further found (Appendix 116a-117a):

"24. The practices claimed by plaintiffs are no part of the liberties of speech and of the press, but if they were, such liberties would be subordinated to the independence of the judiciary and the proper administration of justice."

Judge Pye also stated (Appendix 111a):

"36. By said Rule Part 3rd. plaintiffs are deprived of no rights which they possess under the Constitutions or the Laws. The use of the Courthouse Square for the purposes desired by plaintiffs would be a mere privilege if permitted by the public authorities. Any recordings or photographs which plaintiffs might lawfully make of persons under the protection of the Rule (except those in custody) can be made by them off the Courthouse Square, and at their offices in the vicinity of the Courthouse."

That finding of Judge Pye is to be contrasted with the conclusion of the Court in *Schneider* v. *New Jersey*, 308 U. S. 147, 163 (1939) that:

" . . . the streets are natural and proper places for the dissemination of information and opinion; and one is

not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

On appeal to the Georgia Supreme Court, specific exception was taken (R. 249) to Judge Pye's decision insofar as it permitted the rule to remain in effect and thus "deprives plaintiffs of their right to take pictures on the streets and sidewalks and deprives them of their constitutional rights of freedom of speech and freedom of the press. . . ." The Supreme Court specifically recognized (Appendix 3a-4a) that appellants had challenged the rule on the constitutional grounds. The Georgia Supreme Court further recognized (Appendix 6a) "that freedom of the press means freedom to gather news, write, publish, and circulate it, and that gathering news embraces photographing the news, printing of the photographs, and reproduction of the photographs in the finished newspapers . . ." Nevertheless, the Georgia Supreme Court held (Appendix 11a) "that the duty and disposition of a court to accord a justly ample scope to the liberty of the press should not be carried to the point of an undue abridgment of the court's own freedom . . . In this case the liberty of the press has been invoked in support of acts which the trial judge found were an invasion of the domain within which the authority of the court is exclusive."

It is entirely clear that the constitutional issues with respect to freedom of the press were adequately presented to the lower courts, were fully recognized by those courts, and were definitely ruled upon in the decisions below. Thus, there can be no uncertainty as to either the meaning of the decisions below or as to what was presented to and decided by the lower courts. In these respects, the *Rescue Army* decision is completely inapplicable to this case.

It should be noted also that in the *Rescue Army* case this Court denied review only because of a combination of many uncertainties. The Court said (331 U. S. 584):

> "Were the uncertainties confronting us in relation to this Court's historic policy less in number, and resolving them not so far from our appropriate function in cases coming from state courts, the inconvenience of undergoing trial another time might justify exercising jurisdiction in this cause."

Here there are *no* uncertainties as to the meaning of the rule or the decisions of the lower courts. Moreover, as we shall demonstrate in the next portion of this petition, far more than mere "inconvenience of undergoing trial another time" would be involved if review were denied by the Court in this case.

III.

Denial of review would result in substantial curtailment of First Amendment rights for many months.

As noted above, the only "burden" which resulted from denial of review in the *Rescue Army* case was "the inconvenience of undergoing trial another time", and the Court would not have subjected the complainants to even that "inconvenience" except for the large number of "uncertainties" there involved. Here, there are no "uncertainties" as to the meaning or applicability of Judge Pye's rule or the decisions of the lower courts.

The "inconvenience of undergoing trial another time" would, of course, be experienced by appellants if review were denied by the Court. But the "burden" resulting from denial of review would be far greater, as appellants would be denied their First Amendment rights for the long period of time necessary in order to bring a new "case or controversy" before this Court.

It is clear from the record in this case that, if appellants seek to take pictures or to conduct interviews in the Fulton County Courthouse Square during any trial presided over by Judge Pye, they will be arrested and held in contempt of court. Judge Pye's intention, and the intention of the Sheriff, to enforce the rule is plain. The Georgia Supreme Court is on record as supporting such enforcement. Thus, until this Court sets aside the rule, appellants will be unable to exercise their First Amendment rights in the Fulton County Courthouse Square during trials in Judge Pye's court.

If it be suggested that appellants could violate Judge Pye's rule with impunity on the assumption that it is unconstitutional and ultimately will be set aside, the Court is reminded of the following language in *United States* v. *United Mine Workers*, 330 U. S. 258, 293-294 (1947):

> "Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In *Howat* v. *Kansas*, 258 U. S. 181, 189-90 (1922) this Court said:
>
> > 'An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed

> for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.'
>
> Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, *Worden* v. *Searls*, 121 U. S. 14 (1887), or though the basic action has become moot, *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911)."

Considering the foregoing principle of law and considering the fact that the trial court and the Georgia Supreme Court have definitely held the rule to be valid and enforceable, there is no assurance that the constitutional questions could be successfully raised by a violation of the rule. In any event, the threat of contempt proceedings unquestionably will be effective to restrain freedom of the press in the Fulton County Courthouse Square until this Court acts to set aside the rule.

We respectfully submit that, under the circumstances of this case, such a continued and flagrant impairment of freedom of the press should not be tolerated. Such tolerance would be contrary to this Court's oft-repeated condemnation of restraints of freedom of speech and of the press and particularly the Court's holdings that:

(1) " . . . previous restraint is a form of infringement upon freedom of expression to be especially condemned" (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503 (1952)).

(2) "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interferences" (*Bates* v. *Little Rock*, 361 U. S. 516 (1960)).

(3) "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of demo-

cratic government, to suppress, edit, or censor events which transpire in proceedings before it" (*Craig* v. *Harney*, 331 U. S. 367, 374 (1947)).

(4) The door barring "intrusion" upon freedom of the press must be kept "tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests" (*Roth* v. *United States*, 354 U. S. 476 (1957)).

This Court's customary vigilance to prevent unconstitutional restraints on freedom of speech and of the press requires that review be granted in this case at this time.

IV.

The fatal defect in the rule is that it is too all-inclusive.

The language in the rule providing that "No photograph of any party to any trial, or of any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial, shall be taken at any place in the courthouse building, on the courthouse steps, or on the adjacent sidewalks and public streets" and that "Nothing done or said by any such person at any such place shall be recorded by any television instrument, moving-picture camera or other instrument, sound-scriber, tape recorder, wire recorder, or any other recording device or equipment" is fatally defective and unconstitutional because it is so all-inclusive as to prohibit conduct which the trial judge had no authority to prohibit. The only attack on the order in this case was on that part of it which prohibited the conduct referred to "on the adjacent sidewalks and public streets." Even if it should be held that under some extreme circumstances the taking of pictures, such as the picture of a prisoner in chains, on the sidewalk could be prohibited by a court order, it would not follow that all conduct prohibited in Judge Pye's rule

could be prohibited, and if any of the picture-taking barred was in excess of his authority in such a way as to deprive appellants of their constitutional rights, then all of the rule is void. Not all of the picture-taking barred was such as to interfere with the administration of justice. Certainly the taking of the pictures of a spectator or spectators on the streets after they have left the courtroom could not interfere with the administration of justice, and hence the trial judge, in passing an order including that restriction, exceeded his constitutional power.

Judge Pye's rule thus is subject to the same criticism applied by this Court to the ordinance in *Lovell* v. *City of Griffin*, 303 U. S. 444, 451 (1938):

> "The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. . . . The ordinance embraces 'literature' in its widest sense.
>
> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the City Manager.
>
> "We think that the ordinance is invalid on its face."

Also appropriate is the language of this Court in *Talley* v. *State of California*, 362 U. S. 60, 64 (1960):

> "Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud,

> false advertising and libel. Yet the ordinance is in no manner so limited. . . . This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires."

Judge Pye's rule is equally unconstitutional on its face for the same reasons.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court's order dismissing the appeal and denying certiorari should be reconsidered, review should be granted, and the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

s/ B. P. Gambrell
B. P. Gambrell
1110 Hurt Building,
Atlanta 3, Georgia

s/ W. Glen Harlan
W. Glen Harlan
825 Citizens & Southern
National Bank Building,
Atlanta 3, Georgia

s/ Robert G. Stephens, Jr.
Robert G. Stephens, Jr.
314 Southern Mutual Building,
Athens, Georgia

Counsel for Appellants

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the petition is restricted to grounds specified in this Court's Rule 58 (2).

W. GLEN HARLAN
Of Counsel